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No. 83-434

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

FRANK FOOLS CROW, *et al.*,
*Petitioners,*

v.

TONY GULLET, *et al.*,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## MOTION AND BRIEF ON BEHALF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, INDIAN LAW RESOURCE CENTER, NATIONAL INDIAN YOUTH COUNCIL, NATIONAL LAWYERS GUILD, NAVAJO NATION, PRESBYTERIAN CHURCH (U.S.A.), PUEBLO OF SANTA ANA, TRIBAL SOVEREIGNTY PROGRAM, UNITARIAN UNIVERSALIST CHURCH ASSOCIATION

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MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

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The Indian Law Resource Center and other amici hereby respectfully move, pursuant to Rules 36.1 and 42(3) of its Rules of Practice, for leave to file the attached brief as amici curiae in support of petitioners' effort to seek review of important First Amendment

questions concerning the extent to which the Constitution protects Indian religious freedom.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amici curiae are Indian nations, Indian rights organizations, churches and civil liberties organizations, all of which have either been involved in issues of religious freedom of the type presented in this case or which believe that encroachments on Indian religious freedom ultimately affect the religious freedom of all persons in the United States and that a clear, coherent and equitable application of the law is essential to protecting religious freedom of all people.

The proposed brief of amici addresses the need for granting the writ from a broad perspective not presented by the

parties themselves. The proposed brief discusses the importance of the constitutional question presented and the need for this Court to decide this unsettled question of religious access to particular natural sites.

Amici believe that the lower courts have been developing new and seemingly ungrounded rules and standards that are inconsistent with those fashioned by this Court. Amici also believe that the court below erred in its decision and that the judgment should be reversed.

Amici have requested the consent of the parties to appear. The petitioners have granted such consent, but the respondents have declined to do so. For the foregoing reasons, Amici respectfully move this Court for leave to file the attached brief amici curiae in support

of granting the writ of certiorari.

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American Civil Liberties Union

Center for Constitutional Rights

Indian Law Resource Center

National Indian Youth Council

National Lawyers Guild

Navajo Nation

Presbyterian Church (U.S.A.)

Pueblo of Santa Ana

Tribal Sovereignty Program

Unitarian Universalist Church Association

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# BRIEF ON BEHALF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTION RIGHTS, INDIAN LAW RESOURCE CENTER, NATIONAL INDIAN YOUTH COUNCIL, NATIONAL LAWYERS GUILD, NAVAJO NATION, PRESBYTERIAN CHURCH (U.S.A.), PUEBLO OF SANTA ANA, TRIBAL SOVEREIGNTY PROGRAM UNIVERSALIST UNITARIAN CHURCH ASSOCIATION

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October 12, 1983

## STATEMENTS OF INTEREST OF AMICI CURIAE

### American Civil Liberties Union

The American Civil Liberties Union is a non-profit organization dedicated to the preservation of civil liberties, particularly those guaranteed in the First Amendment. Since its founding in 1920, it has engaged in numerous lawsuits designed to protect the rights at issue in this case. Its membership includes almost 250,000 people throughout the United States who States who are dedicated to the protection of civil liberties. The issues raised in this case, especially as they impact upon the free exercise and establishment clauses, are issues vital to its organization.

### Center for Constitutional Rights

The Center for Constitutional Rights was born out of the southern civil rights movement of the 1960's. Since that time it has developed legal theories in support

of constitutional rights including the First Amendment in many areas. In June, 1982, CCR joined as amicus curiae in Hopi Indian Tribe v. Block to support religious rights in the San Francisco Peaks. Other cases have included the Wounded Knee defendants and Leonard Peltier, South Dakota v. Means, and other religious freedom lawsuits.

Indian Law Resource Center

The Indian Law Resource Center assists Native Americans in protecting their legal rights, human rights, cultures and religions through a program of research, public education and legal assistance.

National Indian Youth Council

The National Indian Youth Council, Inc. (NIYC) is a national, non-profit Indian organization which was founded in Gallup, New Mexico, in 1961. Since that time the NIYC has engaged in a number of organizing activities and legal challenges which have

attempted to preserve and enrich traditional Indian communities and protect Indian traditions both on and off the reservation. Toward that end NIYC has been extensively involved in litigation which has sought to insure the survival of the American Indian religions. NIYC is deeply concerned about the impact of the decision below upon traditional Indian religions should this Court allow that decision to stand.

National Lawyers Guild

The National Lawyers Guild is a nationwide membership organization of 7,000 lawyers, legal workers, law students and jailhouse lawyers with 105 chapters throughout the United States. Since its founding in 1937, the Lawyers Guild has been dedicated to seeking social equality, freedom to dissent and human rights. The Guild has regularly appeared as amicus curiae in defense of civil liberties and

treaty rights of Native people. It is in that context that the Guild supports petitioners in this case.

Navajo Nation

The Navajo Nation is a recognized nation of Indians which is attempting to sustain First Amendment protection for those sites which are significant in their traditional religions.

Presbyterian Church (U.S.A.)

The Presbyterian Church (U.S.A.) is a national religious denomination, formed in June of 1983 by the reunion of two Presbyterian Churches which together now have 3,172,127 members in 13,225 neighborhood congregations, and 21,255 ordained clergy.

The Presbyterian Church (U.S.A.) also has a long history of ministry with Native American people and advocacy for their human and civil rights, as well as scrupulous observance of treaty commitments. Amicus PCUSA is compelled by these

commitments to urge a review of the arguments in this case.

Pueblo of Santa Ana

Pueblo of Santa Ana is a centuries-old traditional Indian pueblo located on the Rio Grande River in Sandoval County, New Mexico. The ancient religious practices of the Pueblo includes important ceremonies and observances which take place at sacred sites and shrines located on former Pueblo lands which are now controlled by the federal Government and the State of New Mexico. Therefore, the Pueblo is vitally interested that its right to continue to practice its religion at these sacred sites be fully protected under the First Amendment of the Constitution and accordingly appears as amicus curiae for petitioners in this case.

Tribal Sovereignty Program

The Tribal Sovereignty Program is a non-profit public foundation concerned

with small scale economic development in 10 Indian communities as well as the protection of Native rights. The program has actively supported Santa Clara Pueblo's efforts to halt geothermal development that threatened their religious gathering area.

Unitarian Universalist Church Association

The Unitarian Universalist Church Association is a voluntary Association of 1,000 societies and fellowships in North America. It joins in submitting this amici curiae brief based upon its policy of amicus intervention in First Amendment religious freedom cases.

## INTRODUCTION

Amici understand that this Court disfavors amicus curiae briefs at the petition for certiorari stage of litigation except in extraordinary cases.

Amici take this extraordinary step in the belief that Fools Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), aff'd No. 82-1852 (8th Cir. 1983) raises issues of particularly great constitutional concern.

This case concerns serious government intrusion into an area that has previously been most protected under the First Amendment. The issues in this case reach to the foundation of American constitutional freedoms -- the right of a people to freely exercise their religion without interference from governmental authorities. Amici ask the Court to review the First Amendment issues raised by this case because this Court has never decided the important questions: What kind of action constitutes a burden on religious practice where religious access to particular natural sites is involved; and, what constitutes a sufficiently

compelling state interest to warrant state interference with Indian religious practices.

Amici also argue that confusion exists among the lower courts regarding the issues presented here which ought to be corrected by this Court.

Amici believe as well that the present confusion and the misguided decisions in this and other similar cases constitute a very grave threat to Indian religious freedoms.

## FACTS

The principal facts in this case are not disputed. Bear Butte has been central and essential to both Lakota-Sioux and Tsistsistas-Cheyenne religious practice since time immemorial. The vision quests held there provide the principal means by which practitioners of both religions maintain their covenants with the Creator. The religious ceremonies held there

require solitude and an unaffected natural environment, conditions that have almost ceased to exist because of defendant's tourist development and construction projects.[1] The State of South Dakota purchased this well known religious site in 1962 and began to build a tourist facility there. In the summer of 1982, the State Parks Department announced that entrance fees would be charged, that permits would be required for overnight camping and that the length of a person's stay at Bear Butte would be regulated.

Petitioners, Lakota-Sioux and Tsistsistas-Cheyenne Medicine and traditional leaders, allege that this action

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(1) Father Peter John Powell, People of of the Sacred Mountain (San Francisco: Harper and Row, 1981); Donna Hedburg, "Nowahus, Bear Butte, Sacred Mountain of the Cheyenne" (Unpublished Thesis, 1976); Anita Parlow, ed., A Song From Sacred Mountain (Pine Ridge: Oglala Lakota Legal Rights Fund, 1983).

by the State of South Dakota in developing the commercial tourist facility at Bear Butte State Park interferes with their religious practices to the extent that they cannot freely or properly exercise their religion. Fundamental to Lakota and Cheyenne spirituality is an underlying belief that what is most important is maintenance of a proper balance between the spiritual and the natural world. Lakota and Cheyenne beliefs and practices are centered in sacred sites where ceremonies occur. Petitioners claim that practitioners of traditional Indian religions have a constitutionally protected right, equal to that of other persons, to practice their religion free from governmental interference.

ARGUMENT

## I. THIS CASE PRESENTS AN IMPORTANT QUESTION TO THIS COURT FOR THE FIRST TIME.

This case presents to this Court for the first time the question of the extent to which the religious use and religious character of a particular natural site are protected by the First Amendment. This Court has never decided a case in which government action is alleged to interfere with long-established practices which depend entirely upon free and undisturbed access to particular sacred sites or particular natural locations. The fundamental question is two-fold: What actions constitute a burden on religious practice where religious access to particular natural sites is involved; and what constitutes a sufficiently compelling government interest to warrant state interferences with Indian religious practices.

There have been an increasing number of cases in recent years involving restrictions on access by Indian people to religious sites. These cases are mentioned below. More such cases are likely to arise. In one of the other recent cases, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), plaintiffs are also expected to petition for review in this Court in this term.

## II. CONFUSION ABOUT THESE ISSUES EXISTS AMONG THE LOWER FEDERAL COURTS.

The relevant decisions of this Court have provided little guidance to the lower courts in deciding cases involving access to sacred sites for religious practice. As a result, new and seemingly ungrounded rules and inconsistent standards are being developed by the lower courts which appear to be out of keeping with principles established by this Court. This Court ought to consider and determine how such controversies are to be decided.

Existing standards established by this Court may be quickly summarized: Where government action imposes a burden upon religious exercise, that burden on free exercise must be balanced against the importance of the government's interest at stake. Cantwell v. Connecticut, 310 U.S. 296 (1940); Sherbert v. Verner, 374 U.S. 398 (1963); and Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder, 406 U.S. at 215, the Court wrote that "only those interests of the highest order and those not otherwise served overbalance legitimate claims to the free exercise of religion." Subsequent decisions have identified a limited number of government interests of sufficient magnitude in each case to warrant the particular restriction on religious freedom involved. The cases in which the governmental interest was upheld have involved interests of the highest magnitude. These have included:

national defense, Gillette v. United States, 401 U.S. 437 (1971); and the maintenance of the social security system, United States v. Lee, 455 U.S. 452 (1982); Widmar v. Vincent, 454 U.S. 263 (1981). None of these decisions consider the questions raised by the problem of government action restricting religious access to and use of sacred sites.

In two cases involving Indian access to particular religious sites, one decided by the Tenth Circuit Court, Hopi Indian Tribe v. Block, No. 81-0481, 8 I.L.R. 3073 (D.D.C. 1983) aff'd. sub nom Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), and one decided by the Sixth Circuit, Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980), the lower courts have begun to develop a new standard or rule under which the court determines whether the practice involved is

"central" or indispensable to the Indians' religious belief. Sequoyah at 1164.

In Sequoyah, the court found that the land which was flooded by the Tellico Dam was not "central to the religious practices" of the plaintiffs and that therefore no burden on free exercise was shown. The court denied relief despite allegations that the flooding would interfere with the religious exercise of the plaintiffs.

In Hopi, supra, a skiing facility in the San Francisco Peaks was alleged to interfere with the Hopi and Navajo religions. Relief was denied on the ground that the sacred peaks were not "central" or "indispensable" to the Indians' religious belief. On appeal, the District of Columbia Circuit Court appeared to move away from the "centrality" standard but decided that plaintiffs seeking to restrict government land use

must at minimum show that the government's proposed land use would impair a religious practice that could not be performed at any other site. The Court decided such a burden had not been shown. Wilson v. Block, supra.

In this case, the problem of the inconsistent standards becomes clear. The court below agreed that Bear Butte is central to both Lakota and Cheyenne religions but nevertheless found that no burden had been shown.

In another case, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981), the Tenth Circuit ruled that the interest in maintaining the Glen Canyon Dam and Reservoir that is "inextricably" linked to a general water system is sufficiently compelling a governmental interest to warrant infringement of religious practices. The Tenth Circuit also ruled that protection of the

sacred site at Rainbow Bridge and the regulation of tourism there would create a "government managed religious shrine" in violation of the Establishment Clause. Thus this decision raises the problem of distinguishing between government land management which violates the Establishment Clause and that which merely avoids infringement of protected religious practices. Again, guidance is called for from this Court.

Moving in the opposite direction, however, the District Court for the Northern District of California in Northwest Indian Cemetery Association v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) enjoined the harvesting of timber and the construction of a road which would have intruded upon sacred locations and interfered with Indian religious practices. In its opinion, the District Court announced that it would apply the existing law to

cases that involve sacred land as it would to any other religious expression situation. Northwest Indian Cemetery Association is currently being appealed to the 9th Circuit. Appeal filed July 22, 1983, No. 83-2225 (9th Cir.).

Thus, the decision in the present case is just one of several such decisions in which the lower courts appear to be adrift, without definite guidance from this Court. The result has been a series of inconsistent decisions and new "rules" that appear to be out of keeping with the principles of the First Amendment. The new standards appear to Amici to be unfounded in this Court's decisions and to be contrary to the principle enunciated in Thomas v. Collins, 323 U.S. 516, 530 (1944) and Wilson v. Block supra that the courts are not to become involved in determiniations of the validity or importance of the religious belief or

practices involved. The courts appear to be in the inappropriate position of determining theological significance of the sites and the religious practices involved.

Moreover, the decisions in the lower courts in cases involving natural sites leave the disturbing impression that Indian religious practices may be accorded less protection under the First Amendment than other religious practices. Certainly no such principles could be constitutionally justified. If development of tourism at Bear Butte is sufficiently important to warrant interference with Indian religious practice, one ought to ask whether are are any substantial limits on states' powers to interfere with religious access to sacred sites.

Only this Court can settle these troubling and increasingly urgent issues and provide the standards to guide the lower courts in this relatively new area.

## III. THERE IS A SERIOUS THREAT TO TRADITIONAL INDIAN RELIGIONS WHICH REQUIRES THIS COURT'S ATTENTION.

We must add that the concern of Amici is very much increased by our awareness that Indian religious practices, particularly traditional religious practices, are gravely threatened by the trend of the lower court decisions and the increasing development and desecration of sacred sites.(2) Native religions are unique and deeply connected to sacred places. Continued encroachment could bring another disastrous consequences. To Native practitioners, land is a living part of a

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(2) A distinction may be made here between judicial treatment of First Amendment cases which involve individual rights and those land theology cases like the present one which involve as well the collective right of Indian people to actively practice and control their spirituality. Rice, "Native Americans and the Free Exercise Clause," 28 Hastings L. J. 1509 (1977).

comprehensive balance of life forms that must continue in natural harmony if the spirituality, indeed life itself, is to survive. Without a functioning religious foundation, Indian tribes and communities, indeed Tribalism itself, could be subject to disintegration and destruction. See, e.g., Vine Deloria, Jr., Metaphysics of Modern Existence (New York: Harper and Row, 1979).

## CONCLUSION

This is an important case which clearly presents an issue which has not before been decided by this Court. This is an appropriate case in which this Court may resolve this issue by granting the petition for certiorari.

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October 12, 1983